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# NO. 94-1945

# In the Supreme Court of the United States

OCTOBER TERM, 1994

SHIRLEY PERKINS, INDIVIDUALLY AND ON BEHALF OF MICHAEL PENN
Petitioner,

v.

PATRICIA GUEY, ET AL
Respondent.

## PETITION FOR WRIT OF CERTIORARI FROM AN APPEAL TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

## RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the district court was correct in allowing the vessel owner to maintain an action for limitation of liability when the vessel owner timely filed a complaint for limitation of liability together with an affidavit stipulating her interest in the vessel at zero, and the court subsequently ordered her insurer to post security, which was accomplished within ten days of the court's order?

## PARTIES TO THE PROCEEDINGS

1. Petitioner is Shirley Perkins, individually and acting on behalf of her minor son, Michael Penn. Ms. Perkins was claimant in the district court and Appellant in the Court of Appeals for the Fifth Circuit.

2. Respondent, Patricia Ann Guey, was the complainant and cross-claimant in the district court and the Appellee in the Court of Appeals for the Fifth Circuit.

3. Respondent, Gulf Insurance Company, Patricia Ann Guey's Underwriter, was the cross-defendant in the district court and Appellee in the Court of Appeals for the Fifth Circuit.

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## OPINIONS AND JUDGMENTS BELOW

Respondent is satisfied with Petitioners presentation of the opinions and judgments of the district court and court of appeal.

## GROUNDS OF JURISDICTION

Respondent is satisfied with Petitioners assertion of the grounds for jurisdiction of this Court.

## STATUTORY PROVISIONS

Petitioners cite 46 U.S.C.A. § 185 in its entirety. Respondent concurs in the applicability of this provision.

Petitioner reproduces only a portion of Supplemental Admiralty and Martime Claims Rule F, 28 U.S.C.A. As such, Respondent cites below additional provisions of Rule F which are believed significant.

> **"Rule F. Limitation of Liability**
>
> **(1) Time for Filing Complaint; Security.** Not later than six months after receipt of a claim in writing, any vessel owner may file a complaint in the appropriate district court, as provided in subdivision (9) of this rule, for limitation of liability pursuant to statute. The owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the owner's interest in the vessel and pending freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court

may from time to time fix as necessary to carry out the provisions of the statutes as amended; or (b) at the owner's option shall transfer to a trustee to be appointed by the court, for the benefit of claimants, the owner's interest in the vessel and pending freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended. . .

. . .

(7) **Insufficiency of Fund or Security.** Any claimant may by motion demand that the funds deposited in the court or the security given by the plaintiff be increased on the ground that they are less than the value of the plaintiff's interest in the vessel and pending freight. Thereupon the court shall cause due appraisement to be made of the value of the plaintiff's interest in the vessel and pending freight; and if the court finds that the deposit or security is either insufficient or excessive it shall order its increase or reduction. In like manner any claimant may demand that the deposit or security be increased on the ground that it is insufficient to carry out the provisions of this statutes relating to claims in respect of loss of life or bodily injury; and, after notice of hearing, the court may similarly order that the deposit or security be increased or reduced.

. . .

## STATEMENT OF THE CASE

On July 4, 1992, the vessel owned by Respondent, Patricia Ann Guey, was involved in an accident on a

navigable waterway in Jefferson Parish, Louisiana. The accident resulted in death of one, serious personal injury to others and property damage. Petitioner herein, Shirley Perkins, brought suit individually and on behalf of Michael Penn, seeking recovery for personal injuries suffered by Penn. Perkins' suit was filed in Louisiana State Court.

On January 7, 1993, within six months of the accident, and therefore clearly within six months "after receipt of a claim in writing," Guey filed a complaint for limitation of liability in United States District Court for the Eastern District of Louisiana. With her complaint Guey filed an affidavit stipulating that the value of her interest in the vessel was zero. This valuation was based on the post-accident value of the vessel and the amount due the vessel's mortgagee.

On April 23, 1993, Guey filed a cross-claim against the insurer of the vessel, Gulf Insurance Company, seeking a judgment requiring Gulf to post security in the event the district court determined security was owed.

On April 28, 1993 the district court dismissed Guey's limitation of liability complaint. This order was reconsidered and vacated on May 10, 1993.

On July 2, 1993, Gulf was ordered to post security in the limitation of liability action brought by Guey. Gulf posted security within ten days of the order, that is, on July 12, 1993. Petitioner Perkins answered Guey's complaint, filed a claim for damages, and moved for summary judgment seeking dismissal of the limitation action on the ground that Guey had failed to post security within six

months of receiving notice of a claim. The motion for summary judgment was denied and Perkins appealed.

The Fifth Circuit Court of Appeals affirmed the district court's denial of Perkins' Motion for Summary Judgment concluding that security had been posted in a timely manner. Respondent contends that this ruling is correct and that Petitioner's application for writ of certiorari should be denied.

## SUMMARY OF THE ARGUMENT

The jurisprudence of the appellate courts and this Court has consistently held that 46 U.S.C.A. §185 and Supplemental Admiralty and Maritime Claims Rule F, 28 U.S.C.A. require only that the complaint and ad interim stipulation be filed within the six month period and that subsequent modification of the amount of security does not divest the district court of jurisdiction.

The statutory language contained in Supplemental Admiralty and Maritime Claims Rule F, 28 U.S.C.A., which incorporates and modifies 46 U.S.C.A. §185, evidences the legislative intent to comport with the jurisprudence allowing district courts to resolve disputes as to the amount of security required after the six month filing period has expired.

## REASONS FOR DENYING THE WRIT

Respondent acknowledges that the issues involved in this case are important. Limitation of liability actions under 46 U.S.C.A. § 185 and Supplemental Admiralty

and Maritime Claims Rule F, 28 U.S.C.A. serve to protect the owner of a vessel from liability in excess of the value of the owner's interest in the vessel. However, the statutory provisions do not require that security be posted within six months in order to vest the court with jurisdiction. Neither is there a conflict among circuits regarding the interpretation of the statutory provisions. None of the considerations governing review on writ of certiorari contained in Sup. Ct. R. 10 are met.

The Petitioner contends that the Second Circuit decision of *Petition of Goulandris,* 140 F.2d 780 (2nd Cir. 1944), cert. den., 322 U.S. 755, 64 S.Ct. 1268, 88 L.Ed. 1584 (1944) conflicts with Fifth Circuit jurisprudence. This is not so.

In *Goulandris, supra,* the owners of a vessel filed a petition for limitation accompanied by a stipulation for costs in the amount of $250, but did not deposit with the court a sum equal to the value of their interest in the vessel. In fact, the *Goulandris* petitioners did not make any representations at all with respect to the value of their interest in the vessel. Instead, the petition prayed for relief only upon "the further application of the petitioners." *Goulandris,* 140 F.2d at 782. No security was posted even though the vessel clearly had significant value. The court, in an effort to prevent the limitation plaintiffs from evading the six month time limit, held they had not complied with the statute.

The facts of the instant case are distinguishable. Guey did not file a petition praying for the court to act only upon her further application. Along with her petition Guey

filed an affidavit supporting her estimate of the value of her interest in the vessel. There was no attempt in this case to evade or circumvent the six month time limitation. The petition and affidavit were filed within two months of receiving notice that a claim was being made. The Second Circuit clearly limited its holding in *Goulandris* as follows:

> "All we decide is that the petition as filed, with nothing further done within the six months, did not satisfy the statutory requirement." *Goulandris,* 140 F.2d at 782.

This Court, in *Black Diamond S.S. Corporation v. Robert Stewart & Sons,* 336 U.S. 386, 69 S.Ct. 622, 93 L. Ed. 754 (1949), held that where there is a dispute as to the amount of security required in a limitation proceeding, the district court retains jurisdiction and has discretion to enter appropriate orders regarding security. This Court stated that:

> ". . . remand to the District Court in order to give Black Diamond an opportunity to file a larger bond would have been a better course, since the defect was not jurisdictional, than affirmance of dismissal of the petition. (citations omitted)" *Black Diamond,* 336 U.S. at 395, 69 S.Ct. at 627, 93 L. Ed. at 763.

*Oil Transport v. Verret,* 278 F.2d 464 (5th Cir. 1960), judgment vacated as moot, 365 U.S. 768, 81 S.Ct. 911, 6 L.Ed.2d 83 (1961), directly addressed the issue presented in this case. The limitation plaintiffs in *Oil Transport,* as did Guey, submitted an affidavit stipulating that the value of their interest in the vessel was zero because the tug had

sunk. Subsequent to the expiration of six months from notice, the court ordered that $170,000 security be posted, finding that the value of the vessel had been miscalculated by plaintiffs. The court distinguished *Goulandris* on the ground that "the entire proceeding" in Goulandris "failed to comply with the requirements of the statute. . ." *Oil Transport,* 278 F.2d at 468. The court in *Oil Transport* held *Black Diamond* applicable, allowed the limitation plaintiffs to amend their stipulation, to post security and to maintain the limitation action. It is Respondent's position that *Oil Transport* and the Fifth Circuit's decision in the present case are not in conflict with decisions of any other circuit and are consonant with *Black Diamond.*

Additional support may be found in the Eleventh Circuit case, *Caribbean Sea Transport Ltd. v. Russo,* 748 F.2d 622 (11th Cir. 1984), modified on rehearing, 753 F.2d 948 (11th Cir. 1985). In *Caribbean Sea* the court was faced with facts substantially similar to those in Guey's case. The petition for limitation was filed on July 27, 1982. No security was posted because the vessel owner took the position that his interest in the vessel and her freight then pending was zero. On October 6, 1983, over one year after the original petition for limitation had been filed, the claimant brought a motion pursuant to Supplemental Admiralty and Maritime Claims Rule F, F(7), 28 U.S.C.A. and the district court ordered the plaintiff to post security in the amount of $112,000. The plaintiff appealed this ruling. At the time of the appellate court decision, no security had been posted. Despite this fact the limitation of liability action was allowed to proceed. *Carribean Sea* supports Guey's position that once a limitation of liability complaint is filed, the district court has and retains jurisdiction even

though the amount of security required is in dispute. A determination that the vessel owner may have miscalculated the value of his or her interest in the vessel does not compel dismissal of the limitation action or divest the court of jurisdiction.

Furthermore, Rule F(7) specifically allows claimants to contest the sufficiency of the security and explicitly grants the court the power to issue orders increasing the security. Rule F(7) does not contemplate and makes no mention of dismissal of the limitation action in the event posting of additional security is found necessary. Had Congress intended to prohibit a complainant from pursuing limitation whenever proper security has not been filed within six months, it could have enacted an explicit provision to this effect. But, this is not what Congress did.

Petitioner cites *In the Matter of the Complaint of Compania Naviera Marasia S.A.*, 466 F.Supp. 900 (S.D.N.Y. 1979) as an example of a court in agreement with the rationale of the *Goulandris* court. The timeliness of the posting of security was not an issue in *Compania Naviera*. The issue was whether the tendered security was valid. Petitoner cites a portion of a sentence from *Compania Naviera*, to wit:

> ". . . the petitioning shipowner must give security at the time of filing the complaint. . ."

Not only is this statement dicta, which Petitioner acknowledges, it is not related to the question presented in this case. The full sentence states:

> "The petitioning shipowner must give security at the time of filing the complaint; and the posting of proper security is a condition precedent to obtaining the injunctive relief order under Rule F(3)." *Compania Naviera*, 466 F.Supp. at 901.

The point of the court's statement is not that the limitation complaint should be dismissed if security is not posted at the time the complaint is filed, but that an injunction enjoining other proceedings against the limitation plaintiff will not be issued until security is posted. *Compania Naviera* supports the decision of the district and appellate courts in the instant case. The *Compania Naviera* court noted that security may be objected to, modified, and court ordered subsequent to the expiration of the six month time limit as the limitation action proceeds.

Supplemental Admiralty and Maritime Claims Rule F, 28 U.S.C.A., which incorporates and modifies 46 U.S.C.A. § 185, sets forth the requirements for instituting a limitation of liability action. A comparison of these statutes indicates a legislative intent to codify the jurisprudential interpretation of § 185 that only the complaint for limitation of liability need be filed within six months of written notice of a claim.

Rule F recognizes the judicial interpretation of 46 U.S.C.A. § 185 in two ways. First, Rule F places the requirements of filing a claim and posting security in separate sentences, whereas 46 U.S.C.A. § 185 contained both requirements in one sentence. Under Rule F it is only the filing of the complaint which is subject to the six month time limit, not the posting of security. Second, under Rule

F(7) any claimant may demand that security be increased on the ground that it is less then the value of the owner's interest in the vessel. Rule F(7) does not contemplate dismissal of the limitation action in the event additional security is ordered after expiration of the six month period.

If this case were to be reviewed and its holding reversed, the practical effect would be to encourage claimants to await the expiration of the six month period before challenging the adequacy of the security, for a successful challenge to the security could result in dismissal of the limitation action. Such a result would be inconsistent with the statutory scheme, the jurisprudence, and the administration of equity in an Admiralty Court.

## CONCLUSION

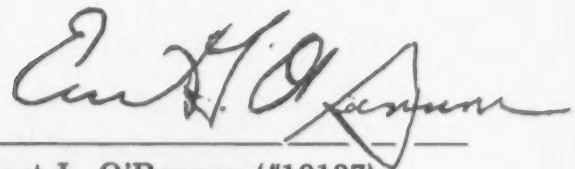
The statutory language at issue in this case is not ambiguous. It provides clearly that the complaint for limitation of liability be filed within six months of receiving notice of a claim. Guey not only filed her complaint within six months, she also filed an affidavit stipulating to the value of her interest in the vessel within the period. The statute provides a procedure for contesting complainant's valuation of her interest in the vessel. The court is granted discretion in determining the adequacy of security and is authorized to order modifications. Absent from the statute is any notion that dismissal of a limitation action is appropriate when it is subsequently determined that the vessel had value and security is required, or that an increase in security is warranted.

The conflict which Petitioner claims to see in cases emanating from the Second and Fifth Circuit does not exist.

It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BIENVENU, FOSTER, RYAN & O'BANNON

BY: 

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## CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of June, 1995, a true and correct copy of the foregoing Response to Petition for Writ of Certiorari was mailed, postage prepaid to the following:

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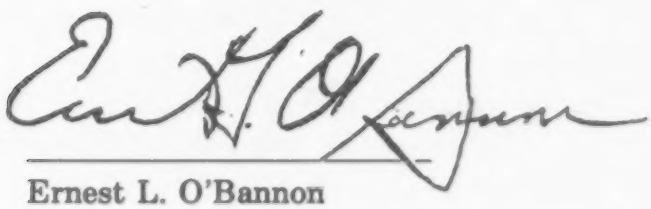

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